Tentative Rulings for May 7, 2015
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

14CECG03646 ***Doe v. Lopez*** **(Dept. 501)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

13CECG02913 ***Herrera v. Community Dental Services, Inc. et al.*** **is continued to Thursday, May 14, 2015 at 3:30 p.m. in Dept. 501.**

13CECG02721 ***Laird v. Dominguez*** **is continued to Tuesday, May 12, 2015, at 3:30 p.m. in Dept. 402.**

15CECG00638 ***Woods v. Green Tree Servicing, LLC*** **is continued to Wednesday, May 27, 2015, in Dept. 502.**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(20) **Tentative Ruling**

Re: ***Vinton v. Stockwell, Harris, Woolverton & Muel***, Superior Court Case No. 13CECG03653

Hearing Date: **May 7, 2015 (Dept. 402)**

Motion: Defendant's to Bifurcate Trial

Tentative Ruling:

To deny. (Code Civ. Proc. §§ 598, 1048.)

Explanation:

Under Code Civ. Proc. § 598, court is given great discretion in regard to the order of issues at trial:

> The court may, when the convenience of witnesses, the ends of justice, or the economy and efficiency of handling the litigation would be promoted thereby, on motion of a party, after notice and hearing, make an order…that the trial of any issue or any part thereof shall precede the trial of any other issue or any part thereof in the case….

Similarly, Code Civ. Proc. § 1048(b) specifies the court's discretion in regard to bifurcating issues for separate trial:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any cause of action … or of any separate issue or of any number of causes of action or issues.

These sections are generally relied upon for bifurcation, usually to try issues of liability before damages issues. "It serves the salutory purpose of avoiding wasting time and money, and prevents possible prejudice to a defendant where a jury might look past liability to compensate a plaintiff through sympathy for his or her damages" (Rylaarsdam & Edmon (The Rutter Group 2013) *California Practice Guide: Civil Procedure Before Trial*, "Case Management & Trial Setting" § 12:414.) The decision to grant or deny a motion to bifurcate issues, and/or to have separate trials, lies within the court's sound discretion. (See, *Grappo v. Coventry Financial Corp*. (1991) 235 Cal.App.3d 496, 503-504.)

Based on the information and evidence presented, it does not appear that bifurcating the trial of liability and damages would significantly promote economy and efficiency. It appears there would be some overlap in evidence presented on both phases. And even if there were not, the court does not feel having one trial on liability, then commencing discovery relating to damages, and then holding a separate trial on damages, would be significantly conducive to economy and efficiency.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 5/6/15.
(Judge's initials) (Date)

03 **Tentative Ruling**

Re: ***Binger v. Omninet Capital, LLC***
Case No. 13CECG03425

Hearing Date: May 7th, 2015 (Dept. 402)

Motion: Defendant U.S. Properties Group, LLC's Demurrer to Complaint

Tentative Ruling:

To overrule U.S. Properties Group's demurrer to the complaint. (Code Civ. Proc. § 430.10, subd.'s (e), (f).) To order U.S. Properties to file and serve its answer within 10 days of the date of service of this order.

Explanation:

First of all, the demurrer is untimely. Under Code of Civil Procedure section 430.40, a defendant may bring a demurrer to a complaint filed against it within 30 days of the date on which the complaint was served on the defendant. (Code Civ. Proc. § 430.40, subd. (a).)

Here, defendant U.S. Properties was added to the case by a Doe amendment on March 24th, 2014 and served on March 27th, 2014. (See Doe Amendment filed March 24th, 2014 and Proof of Service filed April 3rd, 2014. The court intends to take judicial notice of these documents as they are part of the court's file.) Therefore, U.S. Properties had until April 27th, 2014 to file and serve its demurrer to the complaint. However, it did not file its demurrer until March 25th, 2014, almost a year after it was served. As a result, the demurrer is untimely and the court will not consider it.

Even if the court were to consider the merits of the demurrer, it would still overrule it. Defendant's sole argument is that it cannot be sued because it has filed a certificate of cancellation with the Secretary of State, and thus it is no longer a valid business entity with the capacity to be sued. However, defendant's argument appears to support a demurrer for defect or misjoinder of parties, not a demurrer for failure to state a cause of action or uncertainty, which are the only grounds on which defendant has demurred. Thus, the demurrer is procedurally defective, as the notice of demurrer does not raise the correct grounds.

In any event, defendant has failed to submit any judicially noticeable documents that would conclusively establish that it has filed a certificate of cancellation. Under Corporations Code section 17707.02, subdivision (a), "…if a domestic limited liability company has not conducted any business, only a majority of the members, or, if there are no members, the majority of the managers, if any, or if no members or managers, the person or a majority of the persons signing the articles of organization, may execute and acknowledge a certificate of cancellation of articles of organization…" (Corp. Code, § 17707.02, subd. (a).)

"A certificate of cancellation executed and acknowledged pursuant to subdivision (a) shall be filed with the Secretary of State within 12 months from the date that the articles of organization was filed. The Secretary of State shall notify the Franchise Tax Board of the cancellation." (Corp. Code., § 17707.02, subd. (b).)

"Upon filing a certificate of cancellation pursuant to subdivision (a), a limited liability company shall be canceled and its powers, rights, and privileges shall cease." (Corp. Code, § 17707.02, subd. (c).)

Defendant cites to an unpublished Federal District Court case, *Fox Hollow of Turlock Owner's Assn. v. Richard Sinclair* 2013 WL 1628260 (E.D. Cal.) in support of its position that a cancelled LLC cannot be sued. In *Fox Hollow*, the Federal District Court found that the filing of a certification of cancellation by an LLC meant that the LLC ceased to exist, and that it could no longer sue or be sued, citing to Corporations Code section 17356, subd. (b)(1). (*Id*. at *3.) "Due to the certificates of cancellation, Mauctrst can not sue or be sued. All of Mauctrst's claims must be dismissed. Furthermore, when an entity lacks the capacity to be sued, all claims against that entity should be dismissed. As a general matter, this result makes intuitive sense. In the related context of a corporation's capacity to be sued/defend itself, the California Supreme Court stated, 'Not only would it be unfair to sue an entity that was incapable of defending itself, it would also be senseless to render judgment against an entity that had become nonexistent.'" (*Id*. at *4, citations omitted.)

However, in the present case, there is nothing on the face of the complaint or in the judicially noticeable documents[1] that establishes that a certificate of cancellation has actually been filed by U.S. Properties. At most, there is a notation on the Secretary of State's website showing the LLC's status as "cancelled." Yet it is unclear if this notation means that a certificate of cancellation was filed by the LLC. If there were some judicially noticeable documents establishing that the LLC had filed a certificate of cancellation, then U.S. Properties might be entitled to be dismissed, since it would have established that its affairs had been wound up and it no longer existed as a separate corporate entity. There are no such documents before the court, however, so U.S. Properties has not shown that it is not a proper party to the action.[2]

Also, the fact that U.S. Properties may have been dissolved is not enough to show that it cannot be sued. Under Corporations Code section 2010, subdivision (a), "A corporation which is dissolved **nevertheless continues to exist for the purpose of winding**

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[1] Plaintiffs object to the request for judicial notice filed by defendant, in which defendant seeks to take judicial notice of the Secretary of State's web page indicating that U.S. Properties is a cancelled LLC. However, the court intends to overrule the objection, since the Secretary of State's web page is judicially noticeable under Evidence Code section 452, subdivision (c) and (h).

[2] Plaintiffs also submit various other evidence to attempt to establish that U.S. Properties has been doing business and is still a valid legal entity. For example, plaintiffs submit copies of paystubs for security guards and insurance policy named insured extensions. However, such evidence cannot be considered on demurrer, so the court intends to disregard the documents.

up its affairs, prosecuting and **defending actions** by or **against it** and enabling it to collect and discharge obligations, dispose of and convey its property and collect and divide its assets, but not for the purpose of continuing business except so far as necessary for the winding up thereof." (Corp. Code, § 2010, subd. (a), emphasis added.)

In *Penasquitos, Inc. v. Superior Court* (1991) 53 Cal.3d 1180, the California Supreme Court noted that, "courts have repeatedly construed section 2010, its predecessors, and similar language in the statutes of other jurisdictions, as permitting parties to bring suit against dissolved corporations." (*Id*. at 1186.)

Thus, even if U.S. Properties has been dissolved, this does not necessarily mean that it cannot be sued. Regardless of whether the LLC has been dissolved, it can still wind up its affairs and defend itself from lawsuits. Only if a certificate of cancellation had been filed showing that the LLC's affairs have been wound up and it has ceased to exist would U.S. Properties be entitled to have the action against it dismissed. However, there is nothing on the face of the complaint or in the judicially noticeable documents that establishes conclusively that a certificate of cancellation has been filed. Therefore, the court intends to overrule the demurrer to the complaint against U.S. Properties and order it to file its answer.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 5/6/15.
(Judge's initials) (Date)

(28) **Tentative Ruling**

Re: ***Jamco Enterprises, Inc., et al. v. Hauter, et al.***

Case No. 14CECG03136

Hearing Date: May 7, 2015

Motion: By Defendants/Cross-Complainants Mohamed Hauter, Gamilah Hauter and Adam Hauter, Demurring to the First, Fourth and Fifth Causes of Action in the First Amended Complaint brought by Plaintiffs Jamco Enterprises, Inc., Juan Carlos Chavez and Jose Marinez; Motion to Strike Portions of the First Amended Complaint.

Tentative Ruling:

To sustain the Demurrer with leave to amend as to the First Cause of Action. Plaintiff is to file and serve a Second Amended Complaint within 20 days of the clerk's service of this minute order. All new allegations in the first amended complaint are to be set in **boldface** type.

To overrule the Demurrer as to the Fourth and Fifth Causes of Action.

To deny the Motion to Strike.

Explanation:

A general demurrer admits the truth of all material allegations and a Court will "give the complaint a reasonable interpretation by reading it as a whole and all its parts in their context." (*People ex re. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300.)

First Cause of Action for Breach of Written Contract

The Lease Agreement was not attached to the First Amended Complaint ("FAC"). Defendants provided a copy of the Lease with their Demurrer, and Plaintiffs have not objected to consideration of the Lease. The Court therefore assumes that the Lease provided by the Defendants with their Demurrer is the valid operative agreement (as seems conceded by the Plaintiffs).

The basis for the First Cause of Action as briefed by the parties is, essentially, paragraph 2.3 of the Lease, wherein Defendants promised that the Common Areas and Premises were in compliance with local laws applicable at the time the construction or improvements were made (the paragraph contains a caveat that Defendants were not promising to provide the Premises in a state for Plaintiffs' *intended* use). (Paragraph 2.3 of the Lease Agreement).

However, the gravamen of the breach of contract claim as plead in the FAC is that the Premises could not be used for the *intended* purposes absent further work as demanded by the City of Fresno. Paragraph 2.3 is therefore not breached because, as the allegations of the FAC seem to suggest, it was simply costlier than expected to alter the premises for the *intended* use. (FAC ¶¶ 11, 14, 17-19, 22-23, 29). The Lease agreement allocates that risk squarely to Plaintiffs.

The Court notes that Paragraph 17 of the FAC contains language which states that "contrary to their representations and assurances, which were false, the City of Fresno required extensive and costly improvements to the Premises and Common Areas before the Premises could be used for the contemplated purpose, *or for any purpose at all*." (FAC ¶17 (emphasis added).) This language suggests circumstances which might violate the promise of Defendants that the property was in compliance with applicable statutes and standards, but there are no allegations in the FAC connecting the lack of fitness for any purpose to specific provisions of the Lease Agreement such as Paragraph 2.3.

Therefore, the demurrer to the cause of action for breach of written contract should be sustained with leave to amend.

The Fourth and Fifth Causes of Action for Misrepresentation

Here, the main contention from the Defendants in their Demurrer is that the bases for the claims are statements of opinion: that the defendants misrepresented how easy it would be to bring the Premises into compliance and/or misrepresented their ability to do so.

As Plaintiffs have pointed out, however, such statements are actionable as fraud where "one of the parties possesses, or assumes to possess, superior knowledge or special information regarding the subject matter of the representation, and the other party is so situated that he may reasonably rely upon such supposed superior knowledge or special information." (*Harazim* v. *Lynam* (1968) 267 Cal.App.2d 127, 131.) This case seems to fall squarely into that category: Plaintiffs allege that Defendants assured them that the Premises could be made ready for their restaurant/nightclub with little problem and that they could easily help Plaintiffs accomplish that goal. (FAC ¶¶ 17-18.) Plaintiffs allege that this was false, and that Defendants knew this to be false at the time they said it. (FAC ¶ 18.) Therefore, the misrepresentation claims are well-founded, and the Court need not consider the other arguments of Defendants. The Demurrer to the Fourth and Fifth Causes of Action is overruled.

Motion to Strike

Defendants move to strike various allegations and the request for punitive damages on the grounds that there is no basis for the fraud claims. In light of the recommended ruling, the motion to strike should be denied.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 5/6/15.
(Judge's initials) (Date)

Tentative Rulings for Department 403

(20) **Tentative Ruling**

Re: ***Youssef et al. v. Community Medical Center et al.***, Superior Court Case No. 10CECG03582

Hearing Date: **May 7, 2015 (Dept. 403)**

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To deny without prejudice unless counsel appears at the hearing to address the issues discussed below. Counsel will need to call and request oral argument if she intends to appear with new papers at the hearing. Otherwise, Counsel shall comply with Local Rule 2.8.4.

Explanation:

Dalpinder Sanhdu, M.D., one of 10 defendants, has offered to settle the claim of minor Jovani Youssef (one of two plaintiffs), for $14,995. The petition cannot be granted based on the information before the court. There is no information about Sanhdu's policy limits. The petition deducts $19,157 in costs, leaving nothing to be distributed to the minor. It is not clear if the $19,157 represents all costs in the action, or the minor's pro rata share of costs. Since there are three plaintiffs, the minor should only be responsible for one third of the costs. And unless all of the costs listed in section 14 of the petition are attributable to the pursuit of this one defendant, it would seem more fair to deduct only 1/10 of the minor's share of the costs from this settlement.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 05/06/2015.
(Judge's initials) (Date)

(19) **Tentative Ruling**

Re: ***Montenegro v. Desatoff***
Court Case No. 14CECG03341

Hearing Date: May 7, 2015 (Department 403)

Motion: Demurrer by cross-defendant Traffic Loops to cross-complaint of Emmett's Excavation

Tentative Ruling:

To sustain as to third and fourth causes of action without leave to amend, overrule as to all others, order that Traffic Loops file an answer by May 18, 2015.

Explanation:

1. Sustain Demurrer to Third and Fourth Causes of Action

Cross-complainant makes no arguments as to how its claims for contribution and equitable indemnity can survive, given the language of Labor Code section 3864. The demurrer to these two causes of action is therefore sustained without leave to amend.

2. Demurrer Overruled to Other Causes of Action

Labor Code section 3864 permits actions against an employer under an express indemnity agreement, and the cross-complaint alleges just such an agreement. Further, there is no evidence that Civil Code section 2782.05 applies, much less as a matter of law.

We are currently in the pleading stage of this action. There is no evidence from any party proving the claims asserted by Emmett Excavation are "unenforceable to the extent the claims arise out of, pertain to, or relate to the active negligence or willful misconduct of that general contractor" or as "or to the extent the claims do not arise out of the scope of work of the subcontractor pursuant to the construction contract." A complaint cannot be utilized as an admission of a defendant, and the cross-complaint contains no facts admitting active negligence on the part of Emmett Excavation. The required facts for Civil Code section 2872.05 have not been established, nor can they be -- except by summary judgment or adjudication.

"A complaint for declaratory relief is legally sufficient if it set forth facts showing that existence of an actual controversy relating to the legal rights and duties of the respective parties under a written instrument and requests that these rights and duties be adjudged by the court." *Maguire v. Hibernia Savings & Loan Soc.* (1944) 23 Cal. 2d 719, 723. "A declaratory relief action will not be dismissed by the court because the court disagrees with the construction of the contract involved, contended for by plaintiff. A complaint in an action for declaratory relief which recites in detail the dispute between the parties and prays for a declaration of rights and other legal

relations of the parties, states facts sufficient to constitute a cause of action against a motion to dismiss for insufficiency of the complaint." (*Id*. at 724.)

A court has no ability to use its discretion under Code of Civil Procedure § 1060 to decide if it will grant a declaratory judgment in determining if a cause of action for same has been pled. *Ludgate Ins. Co. v. Lockheed Martin Corp.* (2000) 82 Cal. App. 4th 592.

The demurrer to the first, second, and fifth causes of action are therefore overruled.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 05/06/2015.
(Judge's initials) (Date)

(24) **Tentative Ruling**

Re: ***Miranda v. Fresno Unified School District***
Court Case No. 13CECG01801

Hearing Date: **May 7, 2015 (Dept. 403)**

Motion: Fresno Unified School District's Motion for Terminating Sanctions

Tentative Ruling:

To grant the motion to dismiss the action pursuant to Code of Civil Procedure Section 2023.030, subdivision (d)(3). Defendant is directed to submit to this court, within 7 days of service of the minute order, a proposed judgment dismissing the action. Trial set for June 8, 2015, is vacated, as is the Mandatory Settlement Conference set for May 14, 2015, and the Trial Readiness hearing set for June 5, 2015.

Explanation:

Once a motion to compel a party to comply with a discovery request is granted, continued failure to comply may support a request for more severe sanctions. Code of Civil Procedure Section 2023.010, subdivision (g) makes "[d]isobeying a court order to provide discovery" a "misuse of the discovery process," but sanctions are only authorized to the extent permitted by each discovery procedure.

For failure to obey the court's discovery orders or to appear at a noticed deposition, and especially upon failure of the party to obey an earlier order, the court may "make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction under Chapter 7 (commencing with Section 2023.010)." (Code Civ. Proc., § 2025.450(d).)

As a consequence of this failure, the court may: strike out that party's pleadings or parts thereof; stay further proceedings by that party until the order is obeyed, dismiss that party's action, or render default judgment against that party. (Code. Civ. Proc., § 2023.030, subd. (d).)

Service of a proper deposition notice obligates a party to attend and testify, without necessity of subpoena. (Code Civ. Proc., § 2025.280, Subd. (a).) The request for production of documents that was served on plaintiff is reasonable and seeks information related to plaintiff's claims. Plaintiff has not opposed this motion, and thus has not contested defendant's assertion that plaintiff has not participated in the lawsuit or cooperated with discovery, at least since the withdrawal of his counsel (if not before). He therefore has also not contradicted defense counsel's declaration that he offered to dismiss his case in exchange for defendant waiving its right to the court-ordered monetary sanctions. This appears to indicate plaintiff has abandoned his case, even if only informally.

Appellate courts have generally held that before imposing a terminating ("doomsday") sanction, trial courts should usually grant lesser sanctions first, such as orders staying the action until plaintiff complies, or declaring the matters admitted if answers are not received by a specific date. (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 796.) It is only when a party persists in disobeying the court's orders that sanctions such as dismissing an action are justified. The imposition of terminating sanctions is a drastic consequence, one that should not lightly be imposed, or requested. (*Ruvalcaba v. Government Employees Ins. Co*. (1990) 222 Cal.App.3d 1579, 1581.)

However, the court in *Ruvalcaba* noted that where lesser sanctions have been ordered, such as an order compelling compliance with discovery requests, and the party persists in disobeying, the party does so "at his own risk, knowing that such a refusal provided the court with statutory authority to impose other sanctions" such as dismissing the action. (*Id*. at p. 1583.) In fact, the reviewing court in another case, *Todd v. Thrifty Corp.* (1995) 34 Cal. App. 4th 986, found that it was appropriate to dismiss a case without resort to lesser sanctions where plaintiff had failed to respond to interrogatories, a document demand, and a request for statement of damages, and further failed to comply with the court's order compelling the requested discovery.

These same considerations apply even where parties are representing themselves *in propria persona*. Courts have routinely found that parties *in pro per* are treated same as represented parties. (*Monastero v. Los Angeles Transit Co.* (1955) 131 Cal. App. 2d 156, 160-161; Bianco v. CHP (1994) 24 Cal.App.4th 1113, 1125-1126.) As the court noted in *Knapp v. Fleming*, (1953) 127 Colo. 414, 415, "A litigant is permitted to present his own case, but, in so doing, should be restricted to the same rules of evidence and procedure as is required of those qualified to practice law before our courts; otherwise, ignorance is unjustly rewarded."

Here, on virtually the eve of trial, there is no indication that making a lesser sanction order at this juncture would lead to plaintiff's compliance with the discovery process. On balance, in the face of plaintiff's repeated abuse of the discovery process, a terminating sanction is "appropriate to the dereliction" and does not "exceed that which is required to protect the interests of the party entitled to but denied discovery." (*Deyo v. Kilbourne, supra,* 84 Cal.App.3d at 793.)

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 05/06/2015.
(Judge's initials) (Date)

Tentative Rulings for Department 501

(23) **Tentative Ruling**

Re: ***Jane Doe # 3 v. Orange Center Elementary School District***
Superior Court No. 15CECG00174

Hearing Date: Thursday, May 7, 2015 (**Dept. 501**)

Motions: (1) Defendants Orange Center Elementary School District's and Orange Center Elementary School District Board of Trustees' Demurrer to Plaintiff Jane Doe # 3's Complaint

(2) Defendants Orange Center Elementary School District's and Orange Center Elementary School District Board of Trustees' Motion to Strike Portions of Plaintiff Jane Doe # 3's Complaint

Tentative Ruling:

To OVERRULE Defendants' demurrer to Plaintiff's entire complaint pursuant to Code of Civil Procedure section 430.10, subdivision (d).

To SUSTAIN with leave to amend Defendants' demurrer to Plaintiff's second, third, fourth, and fifth causes of action pursuant to Code of Civil Procedure section 430.10, subdivision (e).

To GRANT with leave to amend in part, to DENY in part, and to FIND MOOT in part Defendants' motion to strike portions of Plaintiff's complaint. (Code Civ. Proc., § 436.)

To GRANT Plaintiff 10 days, running from service of the minute order by the clerk, to file and serve a first amended complaint. (Code Civ. Proc., § 472a, subds. (c) & (d).) All new allegations in the first amended complaint are to be set in **boldface** type.

Explanation:

Defendants' Demurrer to Plaintiff's Complaint

1. Defendants' Demurrer to Plaintiff's Entire Complaint

Defendants Orange Center Elementary School District and Orange Center Elementary School District Board of Trustees ("Defendants") demur to Plaintiff Jane Doe # 3's ("Plaintiff") entire complaint on the ground of misjoinder of parties. Specifically, Defendants contend that their demurrer should be sustained because Defendant Orange Center Elementary School District Board of Trustees is not a separate entity that is capable of being sued.

Nevertheless, a demurrer for misjoinder has nothing to do with an entity's capacity for being sued. Rather, a demurrer for misjoinder lies where a person or entity joined in the suit as a plaintiff or defendant does not belong in the case under the rules of compulsory or permissive joinder. (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 973, p. 386.) Here, Defendants have failed to demonstrate that the face of the complaint establishes that Defendant Orange Center Elementary School District Board of Trustees has been improperly compulsorily or permissively joined to this action.

Accordingly, the Court overrules Defendants' demurrer to Plaintiff's entire complaint pursuant to Code of Civil Procedure section 430.10, subdivision (d).

2. *Defendant's Demurrer to Plaintiff's Second Cause of Action for Negligent Supervision of Students*

Defendants demur to Plaintiff's second cause of action for negligent supervision of students on the ground that the cause of action fails to state sufficient facts to constitute a viable cause of action against Defendants. To plead a viable cause of action for negligence, a plaintiff must allege the following essential elements: (1) defendant's legal duty of care; (2) defendant's breach of duty (i.e., the negligent act or omission); (3) the breach was a proximate or legal cause of her injury (i.e., causation); and (4) damages. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673.)

The Court determines that Plaintiff has not alleged all of the facts necessary to establish a viable cause of action for negligent supervision of students. Initially, to the extent that Plaintiff is attempting to impose direct liability upon Defendants for negligent supervision of students, Defendants cannot be directly liable on a negligence theory in the absence of a statute imposing liability. (*Guerrero v. South Bay Union School Dist.* (2003) 114 Cal.App.4th 264, 268 ["A school district owes a duty of care to its students because a special relationship exists between the students and the district. [Citation.] The special relationship, by itself, does not create liability. Tort liability for governmental entities is based upon statute."].) Since Plaintiff has failed to allege a statute imposing liability for negligent supervision of students on Defendants, Plaintiff has not alleged a viable direct liability cause of action for negligent supervision of students against Defendants.

Further, it appears that Plaintiff is also attempting to allege a cause of action for negligent supervision of students against Defendants based on vicarious liability pursuant to Government Code section 815.2, subdivision (a). First, Plaintiff has sufficiently alleged that school authorities had a duty to supervise the conduct of children on school grounds and to enforce the rules and regulations necessary for their protection from foreseeable dangers, even dangers from other school employees. (Plaintiff's Complaint, ¶¶ 54 & 60; *see also C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 869-871.) Second, Plaintiff has sufficiently pled that the breach of the duty to supervise and protect her was the proximate or legal cause of her injuries. (Plaintiff's Complaint, ¶¶ 56 & 62.) Third, Plaintiff has adequately alleged that she has suffered damages due to the breach of duty. (Plaintiff's Complaint, ¶¶ 38-39 & 62.) However, while Plaintiff alleges that the teachers and school employees at Orange Center Elementary School breached their duty to supervise and protect Plaintiff by

failing to adequately supervise her, Plaintiff has failed to plead any facts showing how the teachers and school employees inadequately supervised Plaintiff and breached their duty to her. Therefore, Plaintiff has also failed to allege a viable cause of action for negligent supervision of students against Defendants based on vicarious liability.

Accordingly, the Court sustains with leave to amend Defendants' demurrer to Plaintiff's second cause of action for negligent supervision of students pursuant to Code of Civil Procedure section 430.10, subdivision (e).

3. Defendants' Demurrer to Plaintiff's Third Cause of Action for Breach of Mandatory Duty

Defendants demur to Plaintiff's third cause of action for breach of mandatory duty on the ground that the cause of action fails to state sufficient facts to constitute a viable cause of action against Defendants. To plead a viable cause of action for breach of mandatory duty, a plaintiff must allege the following essential elements: (1) that defendant violated a statute, regulation or ordinance; (2) that plaintiff was harmed; and (3) that defendant's failure to perform its duty was a substantial factor in causing plaintiff's harm. (CACI 423.)

In this case, the Court finds that Plaintiff's cause of action for breach of mandatory duty pursuant to Government Code section 815.6 fails because Plaintiff has not sufficiently alleged that Defendants violated a statute, regulation or ordinance. In Plaintiff's third cause of action, Plaintiff alleges that Defendants were "mandated reporters" pursuant to Penal Code section 11165.7 and, as such, were legally obligated to report reasonably suspected incidents of child abuse to the police and/or child protective services within a very short period of time. (Plaintiff's Complaint, ¶¶ 64-67.) Nevertheless, since a school district and a board of trustees of a school district are not "mandated reporters" pursuant to Penal Code section 11165.7, Defendants had no mandatory duty under the Child Abuse and Neglect Reporting Act to report incidents of child abuse to agencies specified in Penal Code section 11165.9. While Plaintiff appears argues in her opposition to Defendants' demurrer that, since Defendants' employees are "mandated reporters" who have a mandatory duty to report incidents of child abuse, Defendants also have a vicarious mandatory duty as well. However, "[t]o support liability under [Government Code] section 815.6, a statute must impose a duty on the specific public entity sought to be held liable." (*Forbes v. County of San Bernardino* (2002) 101 Cal.App.4th 48, 54.) Since the Child Abuse and Neglect Reporting Act does not purport to impose a reporting duty on Defendants themselves, the Act cannot support a claim against Defendants under Government Code section 815.6.

Accordingly, the Court sustains with leave to amend Defendants' demurrer to Plaintiff's third cause of action for breach of mandatory duty pursuant to Code of Civil Procedure section 430.10, subdivision (e).

4. Defendants' Demurrer to Plaintiff's Fourth Cause of Action for Premises Liability

Defendants demur to Plaintiff's fourth cause of action for premises liability on the ground that the cause of action fails to state sufficient facts to constitute a viable cause of action against Defendants. Since Defendants are public entities, Plaintiff's premises liability cause of action is actually for dangerous condition of public property under Government Code section 835. To state a cause of action for dangerous condition of public property, a plaintiff must allege: (1) that defendant owned or controlled the property; (2) that the property was in a dangerous condition at the time of the incident; (3) that the dangerous condition created a reasonably foreseeable risk of the kind of incident that occurred; (4) that negligent or wrongful conduct of defendant's employee acting within the scope of his or her employment created the dangerous condition OR that defendant had notice of the dangerous condition for a long enough time to have protected against it; (5) that plaintiff was harmed; and (6) that the dangerous condition was a substantial factor in causing plaintiff's harm. (CACI 1100.)

The Court finds that Plaintiff has not pled all of the facts necessary to allege a viable cause of action for dangerous condition of public property. First, Plaintiff has sufficiently alleged that Defendants owned Orange Center Elementary School. (Plaintiff's Complaint, ¶ 70.) Second, Plaintiff has adequately pled that Defendant Clement's office was in a dangerous condition at the time of the incidents because the office had no interior windows in either the walls or door to allow anyone to view inside the office when the office door was shut and the exterior windows of the office were tinted black and covered with blinds. (Plaintiff's Complaint, ¶ 72.) Third and fourth, Plaintiff has sufficiently alleged that she was harmed and that the dangerous condition was a substantial factor in causing Plaintiff's harm. (Plaintiff's Complaint, ¶¶ 38-39 & 78.)

However, initially, while Plaintiff has alleged that the school's premises were maintained in such a way to create a foreseeable risk of injury to those attending the premises, including Plaintiff, Plaintiff has failed to allege that the alleged dangerous condition, the inability to see into Defendant Clement's office when the door was shut due to a lack of internal windows into the office and the fact that the external windows were blocked by tinting and blinds, created a reasonably foreseeable risk that a student at the school would be sexually assaulted or abused in the office. (Plaintiff's Complaint, ¶ 71.) Further, while Plaintiff alleges that Defendants knew of the foreseeable risk of sexual violation and/or assault to its students on or before the beginning of the 2013-2014 school year and consciously failed to adequately secure the premises, Plaintiff has failed to plead that Defendants had notice of the dangerous condition created when Defendant Clement's office door was closed and only Defendant Clement and a student were inside the office for a long enough period of time to have protected against the dangerous condition. (Plaintiff's Complaint, ¶¶ 76-77.)

Accordingly, the Court sustains with leave to amend Defendants' demurrer to Plaintiff's fourth cause of action for premises liability pursuant to Code of Civil Procedure section 430.10, subdivision (e).

5. Defendants' Demurrer to Plaintiff's Fifth Cause of Action for Negligence Per Se

Defendants demur to Plaintiff's fifth cause of action for negligence per se on the ground that the cause of action fails to state sufficient facts to constitute a viable cause of action against Defendants. "To state a cause of action under the negligence per se doctrine, the plaintiff must plead four elements: (1) the defendant violated a statute or regulation; (2) the violation caused the plaintiff's injury; (3) the injury resulted from the kind of occurrence the statute or regulation was designed to prevent; and (4) the plaintiff was a member of the class of persons the statute or regulation was intended to protect." (*Alejo v. City of Alhambra* (1999) 75 Cal.App.4th 1180, 1184-1185.)

The Court determines that Plaintiff has failed to allege all of the facts necessary to establish a viable cause of action for negligence per se. Initially, to the extent that Plaintiff is attempting to impose direct liability on Defendants for negligence per se, the Court finds that Plaintiff has failed to allege a viable direct liability cause of action for negligence per se because Plaintiff has failed to sufficiently allege that Defendants violated a statute or regulation. While Plaintiff alleges that Defendants violated various statutory provisions of the Penal Code, including Penal Code sections 11164-11174.3, Plaintiff has failed to allege facts showing how Defendants violated any provision in those statutes. (Plaintiff's Complaint, ¶ 82.) To the extent that Plaintiff alleges that Defendants breached Penal Code sections 11164-11174.3 by failing to recognize and report Defendant Clement's behavior, the Court finds that Defendants are not "mandated reporters" who are required to report any suspicious of child abuse to specified agencies. (Pen. Code, §§ 11165.7, subd. (a), 11165.9, & 11166, subd. (a).)

Further, it appears that Plaintiff is also attempting to allege a cause of action for negligence per se against Defendants based on vicarious liability pursuant to Government Code section 815.2, subdivision (a). However, as above, Plaintiff has failed to adequately plead that Defendants' employees violated a statute or regulation. While Plaintiff alleges that "Defendants" violated various statutory provisions of the Penal Code, including Penal Code sections 11164-11174.3, Plaintiff has not alleged any facts stating how Defendants' employees violated Penal Code sections 11164-11174.3. Even though Plaintiff has pled that there was a failure to recognize and report Defendant Clement's behavior, these allegations are limited to the "District" and the "Board" and are not alleged against Defendants' employees. (Plaintiff's Complaint, ¶ 31.) Therefore, Plaintiff has also failed to allege a viable cause of action for negligence per se against Defendants based on vicarious liability.

Therefore, the Court sustains with leave to amend Defendants' demurrer to Plaintiff's fifth cause of action for negligence per se pursuant to Code of Civil Procedure section 430.10, subdivision (e).

<u>Defendants' Motion to Strike Portions of Plaintiff's Complaint</u>

Defendants Orange Center Elementary School District's and Orange Center Elementary School District Board of Trustees ("Defendants") move to strike 38 portions of Plaintiff Jane Doe # 3's ("Plaintiff") complaint.

First, Defendants move to strike all references in Plaintiff's complaint to Defendant Orange Center Elementary School District Board of Trustees as a legal entity that can be sued separately from Defendant Orange Center Elementary School District. Defendants argue that the Board of Trustees is not an independent existing entity and can only be sued "[i]n the name by which the district is designated[.]" (Ed. Code, § 35162.) However, the Court determines that Education Code section 35162 does not forbid suing the governing board of a school district separately and apart from the school district and in the board's own name. Further, the Court observes that the governing boards of school districts have been named as defendants to various lawsuits without objection. (See, e.g., *San Leandro Teachers Assn. v. Governing Bd. Of San Leandro Unified School Dist.* (2009) 46 Cal.4th 822; *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627; *California School Employees Assn. v. Governing Bd. Of East Side Union High School Dist.* (2011) 193 Cal.App.4th 540; *Lillian Lopez v. Tulare Joint Union High School Dist. Bd. Of Trustees* (1995) 34 Cal.App.4th 1302.) Therefore, the Court denies Defendants' request to strike all references to Defendant Orange Center Elementary School District Board of Trustees.

Second, Defendants move to strike several portions of Plaintiff's complaint on the ground that Plaintiff's claims for direct liability for negligence against Defendants are improper. To the extent that the challenged portions are in Plaintiff's first cause of action, the heading of Plaintiff's first cause of action identifies that the cause of action is based on Government Code sections 815.2 and 820, making it clear that Plaintiff is alleging vicarious liability against Defendants and the Court denies the motion to strike those challenged portions. Further, to the extent that the challenged portions are in Plaintiff's second, third, fourth, and fifth causes of action, the Court finds that the motion to strike those portions are moot as the Court has already sustained with leave to amend Defendants' demurrer to those causes of action.

Third, Defendants move to strike several portions of Plaintiff's complaint on the ground that Defendants cannot be vicariously liable for Defendant Clement's actions. Case law is clear that Defendants cannot be held vicariously liable for Lance Clement's sexual abuse and assaults of Plaintiff as alleged in the complaint. (*John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, 447-452.) Therefore, initially, the Court strikes with leave to amend Paragraphs 36, lines 1-13, on the ground that Defendant Clement was not acting within the course and scope of his employment when he allegedly sexually assaulted Plaintiff and that Defendants did not ratify Defendant Clement's actions. Further, to the extent that the other challenged portions are in Plaintiff's second, third, fourth, and fifth causes of action, the Court finds that the motion to strike those portions are moot as the Court has already sustained with leave to amend Defendants' demurrer to those causes of action.

For these reasons, the Court grants with leave to amend in part, denies in part, and finds moot in part Defendants' motion to strike portions of Plaintiff's complaint.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 5/6/15.
(Judge's initials) (Date)

Tentative Rulings for Department 502

(5) **Tentative Ruling**

Re: ***Ciolkosz v. West Acres Shopping Center and Chili Night Indian Restaurant***
Superior Court Case No. 15CECG00048

Hearing Date: May 7, 2015 (**Dept. 502**)

Motion: By Defendant Chili Night Indian Restaurant to Strike the Claim for Punitive Damages

Tentative Ruling:

To grant the motion to strike with leave to amend.

An amended complaint in compliance with the ruling must be filed within 10 days of notice of the ruling. Notice runs from the date that the minute order is mailed by the Clerk plus 5 days for mailing. See CCP § 1013. Only those allegations in the first amended complaint that are new or different from those in the original complaint are to be set in **boldface** type.

Explanation:

Plaintiff filed a form complaint on January 7, 2015. It alleges a single cause of action for general negligence. According to the allegations of the complaint, on or about June 4, 2014, Plaintiff was working on the roof of property located at 3209 W. Shaw Avenue, Fresno CA. He alleges that the property "had dangerous conditions on the roof." See ¶ GN-1. While working on the roof, Plaintiff was injured due to the dangerous condition. Id.

On March 25, 2015, Defendant Restaurant filed a motion to strike the claim for punitive damages. Opposition was filed and a reply.

Punitive Damages

A plaintiff must allege ***specific facts*** showing that defendant's conduct was oppressive, fraudulent or malicious (e.g., that defendant acted *with the intent* to inflict great bodily harm on plaintiff or to destroy plaintiff's property or reputation). [*Smith v. Sup.Ct. (Bucher)* (1992) 10 Cal.App.4th 1033, 1041–1042; *Anschutz Entertainment Group, Inc. v. Snepp* (2009) 171 Cal.App.4th 598, 643—allegations that defendant's conduct was intentional, willful, malicious, performed with ill will toward plaintiffs and in conscious disregard of plaintiffs' rights did not satisfy specific pleading requirement]

The complaint at bench alleges only three facts. First, the Plaintiff was working on the roof of a building. Second, the roof had "a dangerous condition." Third, Plaintiff was injured. See ¶ GN-1. This is insufficient. See *Smith*, supra at 1041-1042. In Plaintiff's Memorandum of Points and Authorities in opposition to the motion, allegations are made regarding the placement of razor wire on the roof. But, allegations in a Memorandum of Points and Authorities cannot serve as a substitute for allegations in the Complaint. Therefore, the motion to strike will be granted with leave to amend.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 5-6-15 .
(Judge's initials) (Date)

Tentative Rulings for Department 503

(23) **Tentative Ruling**

Re: ***Jane Doe v. Fresno Unified School District***
Superior Court No. 14CECG01280

Hearing Date: Thursday, May 7, 2015 (**Dept. 503**)

Motion: Defendant Fresno Unified School District's Motion to Strike Portions of Plaintiff Jane Doe's First Amended Complaint

Tentative Ruling:

To DENY Defendant Fresno Unified School District's motion to strike portions of Plaintiff Jane Doe's first amended complaint. (Code Civ. Proc., § 436, subd. (a).)

Explanation:

Defendant Fresno Unified School District ("FUSD") moves to strike the words "sexual assault" at Page 5, paragraph 13, line 8, Page 5, paragraph 14, line 13, Page 5, paragraph 14, line 14, Page 6, paragraph 16, line 1, Page 7, paragraph 19, line 3, and the words "sexually assaulted" at Page 6, Paragraph 16, line 6, Page 6, paragraph 19, line 25, Page 7, paragraph 20, lines 7 and 8, Page 7, paragraph 23, lines 20 and 21, Page 8, paragraph 27, line 25, Page 9, paragraph 28, line 2, Page 9, paragraph 31, line 15, Page 10, paragraph 35, line 13, Page 10, paragraph 36, line 15, Page 11, paragraph 39, line 2, Page 12, paragraph 42, line 1, Page 12, paragraph 43, line 4, Page 12, paragraph 46, line 20, Page 13, paragraph 49, line 15, Page 13, paragraph 50, line 19, and Page 14, paragraph 53, line 7 from Plaintiff Jane Doe's ("Plaintiff") first amended complaint pursuant to Code of Civil Procedure section 436, subdivision (a).

FUSD contends that, since at least eight California Code sections define "sexual assault" as a crime under California law and Plaintiff has failed to allege any facts to overcome the presumption in Penal Code section 26 that the six- and seven-year-old boys that allegedly committed the "sexual assault" were incapable of committing the crime, Plaintiff's claims of "sexual assault" were rendered false and the words "sexual assault" and "sexually assaulted" must be struck from Plaintiff's first amended complaint. In support of its argument, FUSD requests that the Court take judicial notice of the police reports of the April 16, 2013 incident and a school incident report of the March 7, 2014 incident pursuant to Evidence Code section 452, subdivisions (g) and (h).

In this case, first, the Court denies FUSD's request to take judicial notice of the police and school incident reports pursuant to Evidence Code section 452, subdivisions (g) and (h) because the facts and propositions in the police and school incident reports are reasonably subject to dispute. (*See People v. Jones* (1997) 15 Cal.4th 119, 171, fn. 17, overruled on other grounds by *People v. Hill* (1998) 17 Cal.4th 800.)

Second, the Court rejects FUSD's argument that Plaintiff's use of the words "sexual assault" and "sexually assaulted" is irrelevant, false, or improper. Initially, the Court finds that Plaintiff did not have to allege any facts to overcome the presumption of Penal Code section 26 because "[s]ection 26 of the Penal Code providing that a child under the age of 14 is incapable of committing crime has no application in a civil action." (*La Fleur v. Hernandez* (1948) 84 Cal.App.2d 569, 573.) Further, the fact that at least eight California Code sections define the words "sexual assault" as a violation of specified Penal Code sections does not mean that every time the words "sexual assault" are used the words are referring to the crime of "sexual assault." While it is true that Plaintiff alleges in her first amended complaint that she was "sexually assaulted" and was the victim of a "sexual assault[,]" Plaintiff's first amended complaint does not allege that she was "sexually assaulted" as defined in any Penal Code statute and does not plead that the individuals who allegedly assaulted her committed the crime of "sexual assault." Therefore, it appears to the Court that Plaintiff is not alleging that the individuals who purportedly assaulted her committed the crime of "sexual assault," but is only using the terms "sexual assault" and "sexually assaulted" to plead that she was assaulted in a sexual way or manner.

Therefore, the Court denies Defendant FUSD's motion to strike portions of Plaintiff's first amended complaint.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 5-4-15.
(Judge's initials) (Date)

(17) **Tentative Ruling**

Re: ***Hernandez v. Mungia et al.***
Superior Court Case No. 15CECG00389

Hearing Date: May 7, 2015 (Dept. 503)

Motion: Demurrer to Complaint
Motion to Strike

Tentative Ruling:

To overrule the special demurrer to the complaint; to sustain the general demurrer to the first and third causes of action with leave to amend; to grant the motion to strike with leave to amend. A First Amended Complaint shall be filed and served within 10 days of the clerk's service of this minute order. All new allegations shall be in boldface type font.

Explanation:

Demurrer:

A demurrer is made under Code of Civil Procedure section 430.10, and is used to test the legal sufficiency of the complaint or other pleading. (Rylaarsdam & Edmon, *Cal. Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2014) "Attacking the Pleadings" § 7:5.) The demurrer admits the truth all material facts properly pleaded, but not mere contentions, deductions or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Special Demurrer:

The Mission specially demurs to the entire complaint on the grounds that it is uncertain. A special demurrer to a complaint may be brought on the ground the pleading is uncertain, ambiguous, or unintelligible. (Code Civ. Proc., § 430.10, subd. (f).) A pleading must state the essential facts upon which a determination of the controversy depends. Allegations of material facts that are left to surmise are subject to demurrer for uncertainty. (*Ankeny v. Lockheed Missiles and Space Co*. (1979) 88 Cal.App.3d 531, 537.) A demurrer for uncertainty may be sustained when a defendant cannot reasonably determine what it is required to respond to. (*Williams v. Beechnut Nutrition Corp*. (1986) 185 Cal.App.3d 135, 139, fn. 2.)

Failure to Specify Jurisdiction for Quantum Meruit Claim:

Lack of jurisdiction is not a valid ground for demurrer. (Code Civ. Proc. § 430.10.) Furthermore, filing a demurrer constitutes a general appearance and waives any objections to jurisdiction. (*Kriebel v City Council of San Diego* (1980) 112 Cal.App.3d 693, 699-700.) Failure to incorporate the allegations relating to the jurisdiction, type of defendants, and other preliminary allegations into the quantum meruit cause of action

does not render the cause of action uncertain. It takes no special powers of observation to determine this was a clerical error.

Failure to Comply with the Rules of Court

California Rule of Court 2.112 provides that "[e]ach separately stated cause of action, count, or defense must specifically state: (1) [i]ts number (e.g., "first cause of action"); (2) [i]ts nature (e.g., "for fraud"); (3) [t]he party asserting it if more than one party is represented on the pleading (e.g., "by plaintiff Jones"); and (4) [t]he party or parties to whom it is directed (e.g., "against defendant Smith")." With some effort it can be determined that plaintiff means the first cause of action to apply to both defendants, the second to apply to Mungia and the third to apply to the Mission. In the future all pleadings shall comply with Rule of Court 2.112. The Complaint is not fatally uncertain for this omission.

Venue Allegations are Inaccurate or Unclear

"Inaccurate" allegations are not grounds for demurrer. "A demurrer is simply not the appropriate procedure for determining the truth of disputed facts." [Citation.]' " (*Fremont Indemnity Co. v. Fremont General Corp*. (2007) 148 Cal.App.4th 97, 113-114.) The venue allegations are perfectly clear: a defendant entered into a contract here, a defendant lived here when the contract was entered into, and a defendant lives here now. (Complaint ¶ 7.) Nor are improper venue allegations, which must be challenged on a motion to transfer venue, grounds for demurrer. (Code Civ. Proc. § 430.10.) If a defendant contends that the action was filed in the wrong court, it must file a motion for change of venue at the time of answering, demurring, or moving to strike the complaint, or, if not answering, demurring, or moving to strike, within the time allowed to respond to the complaint. (Code Civ. Proc., § §396b, subd. (a).) A defendant waives any defects in venue by failing to make a timely motion for change of venue. (*Forster v Superior Court* (1992) 11 Cal.App.4th 782, 787.)

The special demurrer is overruled.

General Demurrer:

First Cause of Action – Breach of Contract

The Mission contends that the cause of action for breach of contract fails to state facts sufficient to constitute a claim because: 1) the allegations constituting the contract are inadequate; and 2) the complaint admits there was no written contract with the Mission.

The "essential elements of a claim of breach of contract, whether express or implied, are the contract, the plaintiff's performance or excuse for nonperformance, the defendant's breach, and the resulting damages to the plaintiff." (San Mateo Union High School Dist. v. County of San Mateo (2013) 213 Cal.App.4th 418, 439.) Here, plaintiff claims that the contract was neither wholly oral nor wholly written by "based on writing and performance of [the] parties." (Complaint BC-1.) Nevertheless, the

complaint alleges that a copy of the contract is attached as Exhibit 1. That Exhibit appears to be part of a contract as it states the addresses of defendant Mungia and plaintiff and describes the scope of plaintiffs work but does not describe any schedule for completion or price for the work. Nor is the contract signed by the parties. Plaintiff solves this problem by explaining the essential terms of the contract in attachment BC-1, detailing the work to be performed at the Mission facility, the price to be paid, plaintiff's performance, and Mungia's non-performance and plaintiff's damages. However, it is clear that plaintiff was never in a direct contractual relationship with the Mission: "Mungia then hired as a sub-contractor, plaintiff …" and "While the work was performed by [plaintiff] was performed in his capacity as the sub-contractor for Mungia, certainly the work was performed for the benefit of defendant Mission …" (Attachment BC-1.)

As a consequence, it appears that plaintiff cannot state a claim against the Mission for breach of contract as it admits it was never in a contractual relationship with the Mission. In general, a person who is not a party to a contract has no standing to enforce the contract or to recover damages for the wrongful withholding of benefits to a contracting party. (*Republic Indem. Co. v Schofield* (1996) 47 Cal.App.4th 220, 227.) Accordingly, no cause of action can be stated for breach of the Mungia–Mission contract. The one exception is when a party is an intended third-party beneficiary of the contract. For a third party to qualify as a beneficiary of a contract, the contracting parties must have intended to benefit the third party, and their intent must be evident from the terms of the contract. (*Amaral v Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1193-1194.) The general demurrer to the first cause of action is sustained and leave to amend to is granted to allow plaintiff an opportunity to allege, if he truthfully can, that the contract between Mungia and the Mission was entered in to for his benefit.

Third Cause of Action – Quantum Meruit

There are two necessary elements to a quantum meruit recovery. They are that the plaintiff acted pursuant to an express or implied request for services by the defendant and that the services rendered benefited the defendant. (*Day v. Alta Bates Medical Center* (2002) 98 Cal.App.4th 243, 248.) Here, the Complaint fails to explicitly allege an express or implied request that plaintiff perform services, as such the general demurrer is sustained and leave to amend granted.

The Mission further alleges that because plaintiff has attempted to allege a contractual basis for the debt, a quantum meruit count will not lie. Quantum meruit recovery rests on the equitable theory that for reasons of justice, the law implies a contract to pay for services rendered. When the parties have an actual, express contract covering compensation, however, an implied-in-law promise to pay reasonable value has no equitable basis. (*Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal.App.4th 1410, 1419.) However, a party may plead in the alternative and may make inconsistent allegations. (See *Crowley v. Katleman* (1994) 8 Cal. 4th 666, 690-691.) If no contract is found, recovery may be had in quantum meruit.

Mechanic's Lien Law Does Not Preclude This Suit

A mechanic's lien is an involuntary encumbrance against the real property on which the claimant has furnished labor, services, equipment or material for the value of the items or services. (Civ. Code, § 3110.) This security device attaches to the property to ensure that the claimant will be paid. The mechanic's lien is most frequently a subcontractor's sole remedy because a subcontractor generally has no privity with the owner, and the lien may be imposed and enforced without a contractual relationship. However, there is nothing in the mechanics' lien statutes providing that the lien remedy is exclusive if there are other legal or equitable grounds for holding an owner liable for a subcontractor's work. To the contrary, it has long been recognized that "the mechanics' lien statutes were not enacted for the purpose of circumscribing the procedure by which persons enhancing property to the benefit of others might enforce their just claims." (*Rexroth & Rexroth, Inc. v. General Cas. Co*. (1966) 242 Cal.App.2d 363, 371; see Civ. Code, § 3152.) Thus, if there is a basis for a valid cause of action against an owner by a subcontractor, the subcontractor is entitled to a personal judgment against the owner. (See Civ. Code, § 3152; *Sinnock v. Young* (1943) 61 Cal.App.2d 130, 131-132; see also Cal. Mechanics' Liens and Related Construction Remedies (Cont. Ed. Bar 3d ed.2007) §§ 1.19, 1.23 [noting availability of quantum meruit recovery for subcontractor in appropriate circumstances].) "The mechanics' lien laws provide an alternative method of proceeding which is cumulative and not exclusive." (*Rexroth & Rexroth, Inc. v. General Cas. Co., supra*, 242 Cal.App.2d at p. 371.)

Moreover, the Mission's argument is premised on a fact not present on the face of the complaint – that it has paid Mungia in full for the work performed. Accordingly, there is no basis to find the complaint barred by the mechanic's lien law at this time.

Motion to Strike:

A motion to strike can be used to cut out any 'irrelevant, false or improper' matters or "a demand for judgment requesting relief not supported by the allegations of the complaint." (Code Civ. Proc., § 431.10, subd. (b).) A motion to strike is the proper procedure to challenge an improper request for relief, or improper remedy, within a complaint. (*Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 166-167.)

Attorney's fees are not recoverable unless provided for by contract or statute. (*City of Industry v. Gordon* (1972) 29 Cal.App.3d 90, 93.) In his cause of action for breach of contract, plaintiff claims he is entitled to attorney's fees under either a statue or a contract. (Complaint BC-5.) However, plaintiff fails to refer to any statutory authority that permit such an award. If attorney's fees are sought pursuant to contract, that right is governed by Civ. Code section 1717, which provides:

> (a) In any action on a contract, when the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.

The written contract, which is attached to plaintiff's complaint as Exhibit "1" contains no provision for the recovery of attorney's fees. Nor does the complaint describe any oral agreement for the recovery of attorney's fees.

As plaintiff cannot demonstrate a right to attorney's fees if he should prevail on his complaint either under statute or contract, the allegations relating to an award to attorney's fees in the first cause of action are stricken.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 5-6-15 .
(Judge's initials) (Date)